

**FEDERAL ELECTION COMMISSION**

**FACTUAL AND LEGAL ANALYSIS**

RESPONDENT: Crossroads Grassroots Policy Strategies

MUR: 6596

**I. INTRODUCTION**

This matter was generated by a complaint filed by Obama for America and the Democratic National Committee. *See* 52 U.S.C. § 30109(a)(1). The complaint alleges that Crossroads Grassroots Policy Strategies (“Crossroads GPS”) violated the Federal Election Campaign Act of 1971, as amended, (the “Act”) by failing to organize, register, and report as a political committee in 2012. *See* 52 U.S.C. §§ 30102, 30103, and 30104.

As discussed below, the Commission finds reason to believe Crossroads GPS violated 52 U.S.C. §§ 30102, 30103, and 30104, and authorizes an investigation.

**II. FACTUAL AND LEGAL ANALYSIS**

**A. Facts**

**1. Crossroads GPS**

Crossroads GPS is a non-profit corporation that was founded on June 1, 2010.<sup>1</sup> It applied for 501(c)(4) status as a social welfare organization in September 2010.<sup>2</sup> Crossroads GPS’s

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<sup>1</sup> Resp., Ex. D.

<sup>2</sup> Crossroads GPS’s latest public IRS filing indicates its section 501(c)(4) status. *See* Crossroads GPS 2016 Form 990 at 1 (Nov. 13, 2017), available at [https://apps.irs.gov/pub/epostcard/cor/272753378\\_201612\\_9900\\_2017121315023770.pdf](https://apps.irs.gov/pub/epostcard/cor/272753378_201612_9900_2017121315023770.pdf); *see also* *Citizens for Responsibility and Ethics in Washington v. FEC*, 316 F. Supp. 3d 349, 356 n.1 (D. D.C.) (Aug. 3, 2018), *appeal docketed*, No. 18-5261 (D.C. Cir. Aug. 30, 2018) (“Crossroads GPS is a tax-exempt organization ... organized under Section 501(c)(4) of the Internal Revenue Code”) (“*CREW [Crossroads]*”). The Court, in *CREW [Crossroads]*, analyzed the Commission’s failure to pursue a complaint alleging that Crossroads GPS had misreported its independent expenditures under provisions applicable to persons other than political committees. Neither the enforcement action nor the court opinion in this matter explored whether Crossroads GPS was, in fact, a political committee.

1 current officers and directors are Steven Law (President), Steven Duffield (Vice President for  
2 Policy), Sally Vastola (Secretary and Board Member), and Bobby Burchfield (Chairman).<sup>3</sup>

3 Crossroads GPS's Articles of Incorporation state that it "is established primarily to  
4 further the common good and general welfare of the citizens of the United States of America."<sup>4</sup>

5 Crossroads GPS's 2011 Tax Return, submitted as an attachment to the Response, describes its  
6 mission as:

7 Advocat[ing] policy outcomes on pending legislative and regulatory issues  
8 such as: health care reform, taxes, spending and deficits, Congressional  
9 reform and energy and environment. The purpose of these issue advocacy  
10 and grassroots lobbying activities is to promote policies that strengthen the  
11 nation's economy, reduce regulation of private sector activity, and restore  
12 government to a sound financial footing.<sup>5</sup>

13  
14 According to its Articles of Incorporation, to further its stated mission Crossroads GPS  
15 "engag[es] in research, education, and communication efforts regarding policy issues of national  
16 importance that will impact America's economy and national security in the years ahead."<sup>6</sup> On  
17 its website, Crossroads GPS states that it is "dedicated to holding Washington's feet to the fire  
18 on the practical issues that will actually improve our country and our lives."<sup>7</sup> In its Response,

<sup>3</sup> See <http://www.crossroadsgps.org/leadership-team> (last visited Nov. 15, 2018).

<sup>4</sup> Resp., Ex. D.

<sup>5</sup> See Resp., Ex. D; 2011 Tax Return at 1, Schedule O.

<sup>6</sup> Resp., Ex. D.

<sup>7</sup> See <http://www.crossroadsgps.org/about> (last visited Nov. 15, 2018).

1 Crossroads GPS states that its major purpose is “advancing its policy and legislative agenda  
2 through grassroots communications and outreach.”<sup>8</sup>

3 2. Crossroads GPS’s 2012 Activities  
4

5 Crossroads GPS estimates that it spent \$188,886,899 during calendar year 2012.<sup>9</sup> The  
6 group reported spending \$70,968,864 on independent expenditures in 2012.<sup>10</sup> It also reported  
7 spending \$192,973 on two electioneering communications (“Every Level” and “Deflect”).<sup>11</sup>

8 Crossroads GPS states that the following 2012 activities furthered its exempt purpose:

- 9 • Submitting Freedom of Information Act requests and subsequently posting the  
10 documents on [www.wikicountability.org](http://www.wikicountability.org).  
11  
12 • Providing “endorsements and policy commentary” on a variety of “regulatory  
13 activities, policy proposals, and other current events.”  
14  
15 • Creating two websites for citizens to contact their representatives.  
16  
17 • Distributing a series of email newsletters (“Issue Directions”) to supporters.  
18

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<sup>8</sup> Resp. at 9.

<sup>9</sup> Supp. Resp. at 9 (Mar. 20, 2013).

<sup>10</sup> See FEC Form 5 October 2012 Quarterly Report at 1 (October 15, 2012) (\$20,558,081); FEC Form 5 Year-End 2012 Report at 1 (January 15, 2013) (\$50,410,783). In its Supplemental Response, Crossroads GPS includes only the figure from the Year-End 2012 Report (\$50,410,783) in calculating its total independent expenditures for 2012. Supp. Resp. at 9. This report covers only independent expenditures made by Crossroads GPS from October 1 to December 31, 2012. Crossroads GPS, however, also reported spending \$20,558,081 on independent expenditures from July 1, 2012 to September 30, 2012. See also *CREW [Crossroads]*, 316 F. Supp. 3d at 359 (quoting Crossroads GPS’s Answer in that matter that its “independent expenditure reports filed with the FEC speak for themselves”).

<sup>11</sup> See FEC Form 9 at 1 (February 22, 2012) (\$40,401); FEC Form 9 at 1 (February 23, 2012) (\$31,218); FEC Form 9 at 1 (February 23, 2012) (\$3,049); FEC Form 9 at 1 (March 22, 2012) (\$118,305).

- Giving grants to section 501(c)(4) organizations for activities consistent with each organization's exempt purpose.<sup>12</sup>
- Co-hosting policy forums entitled "How Does the Executive Branch's Abuse of Power Threaten Our Economy?" and "ObamaCare: Then and Now."
- Producing and airing ads that do not contain express advocacy or its functional equivalent, including December 2012 ads<sup>13</sup> related to the "fiscal cliff" negotiations.<sup>14</sup>

Crossroads GPS contends that all of this activity shows that it does not have as its major purpose the nomination or election of federal candidates, and therefore it is not a political committee under the Act and Commission regulations.

#### **B. Analysis**

##### **1. The Test for Political Committee Status**

The Act and Commission regulations define a "political committee" as "any committee, club, association or other group of persons which receives contributions aggregating in excess of \$1,000 during a calendar year or which makes expenditures aggregating in excess of \$1,000 during a calendar year."<sup>15</sup> In *Buckley v. Valeo*,<sup>16</sup> the Supreme Court held that defining political committee status "only in terms of the annual amount of 'contributions' and 'expenditures'"

<sup>12</sup> Crossroads GPS states that "[g]rants are accompanied by a letter of transmittal stating that the funds are to be used only for tax-exempt function purposes of the grantee organization and not to be used in connection with any political or non-exempt activity." Resp., Ex. E.

<sup>13</sup> Crossroads GPS spent \$500,000 to air "Over" and \$240,000 to air "Balanced" during December 2012. <http://www.crossroadsgps.org/2012/12/crossroads-gps-launches-new-tv-ad-criticizing-obamas-lack-of-balance-in-fiscal-cliff-talks/>; <http://www.crossroadsgps.org/2012/12/crossroads-gps-launches-new-radio-ads-urging-senators-to-support-a-truly-balanced-fiscal-cliff-plan/>.

<sup>14</sup> Resp., Ex. E; Supp. Resp. at 7.

<sup>15</sup> 52 U.S.C. § 30101(4)(A); 11 C.F.R. § 100.5.

<sup>16</sup> 424 U.S. 1 (1976).

1 might be overbroad, reaching “groups engaged purely in issue discussion.”<sup>17</sup> To cure that  
2 infirmity, the Court concluded that the term “political committee” “need only encompass  
3 organizations that are under the control of a candidate or the *major purpose of which is the*  
4 *nomination or election of a candidate.*”<sup>18</sup> Accordingly, under the statute as thus construed, an  
5 organization that is not controlled by a candidate must register as a political committee only if  
6 (1) it crosses the \$1,000 threshold and (2) it has as its “major purpose” the nomination or election  
7 of federal candidates.

8 a. The Commission’s Case-By-Case Approach to Major Purpose

9 Although *Buckley* established the major purpose test, it provided no guidance as to the  
10 proper approach to determine an organization’s major purpose.<sup>19</sup> In *Massachusetts Citizens for*  
11 *Life v. FEC* (“*MCFL*”),<sup>20</sup> the Supreme Court identified an organization’s independent spending  
12 as a relevant factor in determining an organization’s major purpose.<sup>21</sup> In large measure, the  
13 contours of political committee status — and the major purpose test — have been left to the  
14 Commission.<sup>22</sup>

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<sup>17</sup> *Id.* at 79.

<sup>18</sup> *Id.* (emphasis added).

<sup>19</sup> See, e.g., *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 556 (4th Cir. 2012), *cert. denied*, 81 U.S.L.W. 3127 (U.S. Jan. 7, 2013) (No. 12-311) (“*RTAA*”).

<sup>20</sup> 479 U.S. 238 (1986).

<sup>21</sup> *Id.* at 249, 262.

<sup>22</sup> Like other administrative agencies, the Commission has the inherent authority to interpret its statute through a case-by-case approach. See *SEC v. Chenery Corp.*, 332 U.S. 194, 202-03 (1947) (“[T]he choice made between proceeding by general rule or by individual . . . litigation is one that lies primarily in the informed discretion of the administrative agency.”).

1 Following *Buckley*, the Commission adopted a policy of determining on a case-by-case  
2 basis whether an organization is a political committee, including whether its major purpose is the  
3 nomination or election of federal candidates.<sup>23</sup> The Commission has periodically considered  
4 proposed rulemakings that would have determined major purpose by reference to a bright-line  
5 rule — such as proportional (*i.e.*, 50%) or aggregate threshold amounts spent by an organization  
6 on federal campaign activity. But the Commission consistently has declined to adopt such  
7 bright-line rules.<sup>24</sup>

8 In 2004, for example, the Commission issued a notice of proposed rulemaking asking  
9 whether the agency should adopt a regulatory definition of “political committee.”<sup>25</sup> The  
10 Commission declined to adopt a bright-line rule, noting that it had been applying the major  
11 purpose test “for many years without additional regulatory definitions,” and concluded that “it  
12 will continue to do so in the future.”<sup>26</sup>

13 a. Challenges to the Commission’s Major Purpose Test and the Supplemental E&J

14  
15 When the Commission’s 2004 decision not to adopt a regulatory definition was  
16 challenged in litigation, the court rejected plaintiffs’ request that the Commission initiate a new  
17 rulemaking.<sup>27</sup> The district court found, however, that the Commission had “failed to present a

<sup>23</sup> Political Committee Status, 72 Fed. Reg. 5595 (Feb. 7, 2007) (“Supplemental E&J”).

<sup>24</sup> See Independent Expenditures; Corporate and Labor Organization Expenditures, 57 Fed. Reg. 33,548, 33,558-59 (July 29, 1992) (Notice of Proposed Rulemaking); Definition of Political Committee, 66 Fed. Reg. 13,681, 13,685-86 (Mar. 7, 2001) (Advance Notice of Proposed Rulemaking); see also Summary of Comments and Possible Options on the Advance Notice of Proposed Rulemaking on the Definition of “Political Committee,” Certification (Sept. 27, 2001) (voting 6-0 to hold proposed rulemaking in abeyance).

<sup>25</sup> See Political Committee Status, 69 Fed. Reg. 11,736, 11,745-49 (Mar. 11, 2004) (Notice of Proposed Rulemaking).

<sup>26</sup> See Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees, 69 Fed. Reg. 68,056, 68,064-65 (Nov. 23, 2004) (explanation and justification).

<sup>27</sup> *Shays v. FEC*, 424 F. Supp. 2d 100, 117 (D.D.C. 2006) (“*Shays I*”).

1 reasoned explanation for its decision” to engage in case-by-case decision-making, rather than  
2 rulemaking, and remanded the case to the Commission to explain its decision.<sup>28</sup>

3         Responding to the remand, the Commission issued a Supplemental Explanation and  
4 Justification for its final rules on political committee status to further explain its case-by-case  
5 approach and provide the public with additional guidance as to its process for determining  
6 political committee status.<sup>29</sup> The Supplemental E&J explained that “the major purpose doctrine  
7 requires fact-intensive analysis of a group’s campaign activities compared to its activities  
8 unrelated to campaigns.”<sup>30</sup> The Commission stated that the determination of an organization’s  
9 major purpose “requires the flexibility of a case-by-case analysis of an organization’s conduct  
10 that is incompatible with a one-size fits-all rule,” and that “any list of factors developed by the  
11 Commission would not likely be exhaustive in any event, as evidenced by the multitude of fact  
12 patterns at issue in the Commission’s enforcement actions considering the political committee  
13 status of various entities.”<sup>31</sup> To determine an entity’s “major purpose,” the Commission  
14 explained that it considers a group’s “overall conduct,” including public statements about its  
15 mission, organizational documents, government filings (*e.g.*, IRS notices), the proportion of  
16 spending related to “Federal campaign activity (*i.e.*, the nomination or election of a Federal  
17 candidate),” and the extent to which fundraising solicitations indicate funds raised will be used to  
18 support or oppose specific candidates.<sup>32</sup> The Commission stated in the Supplemental E&J that it

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<sup>28</sup> *Id.* at 116-17.

<sup>29</sup> Political Committee Status, 72 Fed. Reg. 5595 (Feb. 7, 2007) (“Supplemental E&J”).

<sup>30</sup> *Id.* at 5601-02.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 5597, 5605.

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1 compares how much of an organization's spending is for "*federal campaign activity*" relative to  
2 "activities that [a]re not campaign related."<sup>33</sup>  
3

4 To provide the public with additional guidance, the Supplemental E&J referenced  
5 enforcement actions on the public record, as well as advisory opinions and filings in civil  
6 enforcement cases following the 2004 rulemaking. *Id.* at 5604-05. The Commission noted that  
7 the settlements in several MURs involving section 527 organizations "provide considerable  
8 guidance to all organizations" regarding the application of the major purpose test and "reduce  
9 any claim of uncertainty because concrete factual examples of the Committee's political  
10 committee analysis are now part of the public record." *Id.* at 5595, 5604. After the Commission  
11 issued the Supplemental E&J, certain plaintiffs renewed challenges they had brought, under the  
12 Administrative Procedure Act,<sup>34</sup> to the Commission's case-by-case approach to determining  
13 political committee status. The court rejected the challenge, upholding the Commission's case-  
14 by-case approach as an appropriate exercise of the agency's discretion.<sup>35</sup> The court recognized  
15 that "an organization . . . may engage in many non-electoral activities so that determining its  
16 major purpose requires a very close examination of various activities and statements."<sup>36</sup>

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<sup>33</sup> *Id.* at 5601, 5605 (emphasis added); *see also Shays v. FEC*, 511 F. Supp. 2d 19, 24-25, 31 (D.D.C. 2007) (upholding the Commission's case-by-case approach as an appropriate exercise of the agency's discretion); *RTAA*, 681 F.3d 544, 556 (holding that *Buckley* "did not mandate a particular methodology for determining an organization's major purpose," and therefore the Commission was free to make that determination "either through categorical rules or through individualized adjudications").

<sup>34</sup> 5 U.S.C. §§ 551-59.

<sup>35</sup> *Shays*, 511 F. Supp. 2d at 24.

<sup>36</sup> *Id.* at 31.



1 In 2012, in *RTAA*, the Fourth Circuit likewise rejected a constitutional challenge to the  
2 Commission's case-by-case determination of major purpose. The court upheld the  
3 Commission's approach, finding that *Buckley* "did not mandate a particular methodology for  
4 determining an organization's major purpose," and so the Commission was free to make that  
5 determination "either through categorical rules or through individualized adjudications."<sup>37</sup> The  
6 court concluded that the Commission's case-by-case approach was "sensible, . . . consistent with  
7 Supreme Court precedent and does not unlawfully deter protected speech."<sup>38</sup> The Fourth Circuit  
8 concluded that the Supplemental E&J provides "ample guidance as to the criteria the  
9 Commission might consider" in determining an organization's political committee status and  
10 therefore is not unconstitutionally vague.<sup>39</sup>

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<sup>37</sup> *RTAA*, 681 F.3d at 556.

<sup>38</sup> *Id.* at 558. The *RTAA* court rejected an argument — similar to the one made by Crossroads GPS here — that the major purpose test must be confined to "(1) examining an organization's expenditures to see if campaign-related speech amounts to 50% of all expenditures; or (2) reviewing 'the organization's central purpose revealed by its organic documents.'" *RTAA*, 681 F.3d at 555. The Fourth Circuit recognized that determining an organization's major purpose "is inherently a comparative task, and in most instances it will require weighing some of the group's activities against others." *Id.* at 556; *see also Koerber v. FEC*, 483 F. Supp. 2d 740 (E.D.N.C. 2008) (denying preliminary relief in challenge to Commission's approach to determining political committee status, and noting that "an organization's 'major purpose' is inherently comparative and necessarily requires an understanding of an organization's overall activities, as opposed to its stated purpose"); *FEC v. Malenick*, 310 F. Supp. 2d 230, 234-37 (D.D.C. 2004) (considering organization's statements in brochures and "fax alerts" sent to potential and actual contributors, as well as its spending influencing federal elections); *FEC v. GOPAC, Inc.*, 917 F. Supp. 851, 859 (D.D.C. 1996) ("The organization's purpose may be evidenced by its public statements of its purpose or by other means, such as its expenditures in cash or in kind to or for the benefit of a particular candidate or candidates."); *id.* at 864, 866 (applying a fact-intensive inquiry, including review of organizations' meetings attended by national leaders and organization's "Political Strategy Campaign Plan and Budget," and concluding that organization did not have as its major purpose the election of federal candidates).

<sup>39</sup> *Id.*; *see also Free Speech v. FEC*, 720 F.3d 788 (10th Cir. 2013) (quoting *RTAA* and upholding Commission's case-by-case method of determining political committee status), *cert. denied*, 134 S.Ct. 2288 (2014). The Supreme Court's decision in *FCC v. Fox Television Stations, Inc.* is not to the contrary. *See* 132 S. Ct. 2307, 2317 (2012) ("[A] regulation is not vague because it may at times be difficult to prove an incriminating fact but rather because it is unclear as to what fact must be proved"). In that case, the FCC's indecency standard was held to be vague for lack of notice when it applied a new stricter standard, *ex post facto*, to the Fox defendants, and when it relied on a single "isolated and ambiguous statement" from a 50-year old administrative decision to support its finding of indecency against the ABC defendants. *Id.* at 2319. Here, in sharp contrast, the Supplemental E&J — which was issued several years before the conduct at issue — provides extensive guidance on the Commission's

1 The Commission's application of the major purpose test was recently considered in a  
2 case following the Commission's 3-3 vote regarding allegations that two organizations failed to  
3 register and report as political committees.<sup>40</sup> The Court held that the controlling Commissioners'  
4 analysis was contrary to law, finding that their statement of reasons adopted erroneous standards  
5 for determining (1) which spending indicates the "major purpose" of nominating or electing a  
6 candidate, and (2) the relevant time period for evaluating a group's spending.<sup>41</sup> The Court  
7 instructed the Commission, when examining the organization's major purpose, to look beyond  
8 express advocacy and consider whether the other communications at issue indicate a "campaign-  
9 related purpose."<sup>42</sup> The Court also held that the Commission's analysis of the relevant time  
10 period for evaluating a group's spending must retain the flexibility to account for changes in an  
11 organization's major purpose over time.<sup>43</sup> The court remanded the case to the Commission for  
12 further proceedings consistent with its opinion.<sup>44</sup>

approach to major purpose and has withstood both APA and constitutional challenges. *See Center for Individual Freedom v. Madigan*, 697 F.3d 464 (7th Cir. 2012) ("*Madigan*") (rejecting vagueness challenge to the definition of "political committee" in the Illinois campaign finance statute).

<sup>40</sup> *CREW v. FEC*, 209 F. Supp. 3d 77, 80 (D.D.C. 2016) (considering, *inter alia*, political committee status of American Action Network, Inc.) ("*CREW [AAN] P*").

<sup>41</sup> *Id.* at 89-95.

<sup>42</sup> *Id.* at 93.

<sup>43</sup> *Id.* at 94 (noting that "an organization's major purpose can *change*" and citing *MCFL*, 479 U.S. at 262, for proposition that "a group's 'spending [may] *become* so extensive that the organization's major purpose may be regarded as campaign activity [such that] the corporation would be classified as a political committee'" (emphasis in original)).

<sup>44</sup> *Id.* at 81.

1 Following the remand order in *CREW [AAN] I*, the Commission again deadlocked on one  
2 of the matters under a new controlling analysis. The complainants sought judicial review, and  
3 the matter returned to the same district court, which held in *CREW [AAN] II* that the revised  
4 application of its case-by-case major purpose inquiry was again contrary to law because the  
5 controlling Commissioners' statement of reasons failed "to presume that spending on  
6 electioneering communications contributes to a 'major purpose' of nominating or electing a  
7 candidate for federal office, and, in turn, to presume that such spending supports designating an  
8 entity as a 'political committee' under [the Act]."<sup>45</sup> The court concluded that the legislative  
9 history and statutory text require these presumptions.<sup>46</sup>

10 b. Organizational and Reporting Requirements for Political Committees  
11

12 Political committees must comply with certain organizational and reporting requirements  
13 set forth in the Act. They must register with the Commission, file periodic reports for disclosure  
14 to the public, appoint a treasurer who maintains its records, and identify themselves through  
15 "disclaimers" on all of their political advertising, on their websites, and in mass e-mails.<sup>47</sup>

16 In the wake of the Supreme Court's decision in *Citizens United v. FEC*,<sup>48</sup> which struck  
17 down the Act's prohibitions on corporate independent expenditures and electioneering  
18 communications, the D.C. Circuit held in *SpeechNow* that political committees that engage only  
19 in independent expenditures are not subject to contribution limits.<sup>49</sup> These political committees,

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<sup>45</sup> *CREW v. FEC*, 299 F. Supp. 3d 83, 101 (D. D.C. Mar. 20, 2018) ("*CREW [AAN] IP*").

<sup>46</sup> *Id.* at 94-97.

<sup>47</sup> See 52 U.S.C. §§ 30102-30104; 11 C.F.R. §110.11(a)(1).

<sup>48</sup> 130 S. Ct. 876 (2010).

<sup>49</sup> *SpeechNow.org v. FEC*, 599 F.3d 686, 696 (D.C. Cir. 2010) ("*SpeechNow*").

1 often referred to as independent expenditure-only political committees or Super PACs, continue  
2 to be subject, however, to the “minimal” reporting requirements<sup>50</sup> and the organizational  
3 requirements<sup>51</sup> of the Act.<sup>52</sup> These requirements, which promote disclosure, do not, of course,  
4 prohibit speech.<sup>53</sup> Notably, the Supreme Court has stressed that such requirements serve the  
5 vital role of disclosure in political discourse.<sup>54</sup>

6 2. Application of the Test for Political Committee Status to Crossroads GPS

7 a. Statutory Threshold  
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9 To assess whether an organization has made an “expenditure,” the Commission analyzes  
10 whether spending on any of an organization’s communications made independently of a  
11 candidate constitute express advocacy under 11 C.F.R. § 100.22.<sup>55</sup> Crossroads GPS reported  
12 spending \$70,968,864 on independent expenditures in 2012, which, by definition, is spending on

<sup>50</sup> See 52 U.S.C. §§ 30102, 30103, and 30104(a).

<sup>51</sup> See 52 U.S.C. §§ 30101(4) and 30101(8).

<sup>52</sup> *SpeechNow.org*, 599 F.3d at 697. Super PACs are also subject to certain source restrictions, such as prohibitions on contributions from foreign nationals (52 U.S.C. § 30121) and federal contractors (52 U.S.C. § 30119).

<sup>53</sup> *RTAA*, 681 F.3d at 552 n.3.

<sup>54</sup> See *Citizens United*, 130 S. Ct. at 916 (recognizing that increased “transparency” resulting from FECA disclosure requirements “enables the electorate to make informed decisions and give proper weight to different speakers and messages”); *Doe v. Reed*, 561 U.S. 186, 130 S. Ct. 2811, 2820 (2010) (holding that public disclosure of state referendum petitions serves important government interest of “promot[ing] transparency and accountability in the electoral process,” and “preserving the integrity of the electoral process”); see also *Doe*, 130 S. Ct. at 2837 (Scalia, J., concurring) (“Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed.”); *Madigan*, 697 F.3d at 490 (upholding Illinois’s campaign finance disclosure provisions against constitutional facial challenge, finding a substantial relation to “Illinois’s interest in informing its electorate about who is speaking before an election”).

<sup>55</sup> See Supplemental E&J at 5606.

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1 communications “expressly advocating the election or defeat” of federal candidates.<sup>56</sup> Thus,  
2 Crossroads GPS far exceeded the \$1,000 statutory threshold for political committee status, which  
3 requires that a committee, club, association, or other group of persons receive more than \$1,000  
4 in contributions or make more than \$1,000 in expenditures during a calendar year.<sup>57</sup>

5 b. Major Purpose  
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7 Crossroads GPS states in its responses, on its website, and in its tax returns that its major  
8 purpose is not federal campaign activity, but rather “advancing its policy and legislative agenda  
9 through grassroots communications and outreach.”<sup>58</sup> The Commission noted in the  
10 Supplemental E&J that it may consider such statements in its analysis of an organization’s major  
11 purpose, but such statements are not necessarily dispositive.<sup>59</sup> Under the Commission’s case-by-  
12 case approach, the Commission considers the organization’s “overall conduct,” including its  
13 disbursements, activities, and statements.<sup>60</sup> In this case, Crossroads GPS’s proportion of  
14 spending related to federal campaign activity is alone sufficient to establish that there is reason to  
15 believe that its major purpose in 2012 was the nomination or election of federal candidates.

<sup>56</sup> See *supra* at 4-5; 11 C.F.R. § 100.16 (defining “independent expenditure”).

<sup>57</sup> See 52 U.S.C. § 30101(4)(A); Supplemental E&J at 5606; see also 11 C.F.R. § 100.5.

<sup>58</sup> Resp. at 9; Supp. Resp. at 7-8; <http://www.crossroadsgps.org/about/> (last visited Nov. 15, 2018) (noting that Crossroads GPS uses “every available means – from TV ads to constituent letters – to help educate busy people and urge our leaders to take action”).

<sup>59</sup> See Supplemental E&J at 5606; *Real Truth About Obama v. FEC*, No. 3:08-cv-00483, 2008 WL 4416282, at \*14 (E.D. Va. Sept. 24, 2008) (“A declaration by the organization that they are *not* [organized] for an electioneering purpose is not dispositive.”) (emphasis in original, alteration added), *aff’d*, 575 F.3d 342 (4th Cir. 2009), *vacated on other grounds*, 130 S. Ct. 2371 (2010), *remanded and decided*, 796 F. Supp. 2d 736, *affirmed sub nom. RTAA*, 681 F.3d 544.

<sup>60</sup> Supplemental E&J at 5597.

1 Crossroads GPS reported spending \$70,968,864 on independent expenditures in 2012, all  
2 of which, by definition, expressly advocate the election or defeat of federal candidates and which  
3 indicate a purpose to elect or nominate federal candidates.<sup>61</sup> In addition, the available  
4 information indicates that Crossroads GPS spent at least \$67,678,000 in 2012 on 36 additional  
5 communications that, though not containing express advocacy, oppose or criticize clearly  
6 identified Federal candidates; two of these 36 were reported as electioneering communications.<sup>62</sup>  
7 In past enforcement actions, the Commission has determined that funds spent on  
8 communications that support or oppose a clearly identified federal candidate, but do not contain  
9 express advocacy, are appropriately considered in determining whether that group has federal  
10 campaign activity, *i.e.*, the nomination or election of federal candidates, as its major purpose.<sup>63</sup>  
11 This approach is consistent with the court's reasoning in *CREW [AAN] I*, namely that, when

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<sup>61</sup> See 11 C.F.R. § 100.16.

<sup>62</sup> As noted above, the disbursements that Crossroads GPS reported as electioneering communications totaled \$192,973.

<sup>63</sup> See Factual and Legal Analysis at 11-14, MUR 6538R (Americans for Job Security) (finding that non-express advocacy communications that criticize or support federal candidates satisfy major purpose); Conciliation Agreement ¶ IV.11, MUR 5754 (MoveOn.org Voter Fund) (relying on funds used for advertisements that "opposed" or "criticized" George W. Bush to establish political committee status); Factual and Legal Analysis at 2, MUR 5753 (League of Conservation Voters 527) (finding major purpose satisfied where funds spent on door-to-door and phone bank express advocacy campaign, and also on advertisements "supporting or opposing clearly identified federal candidates, some of which contained express advocacy"); Conciliation Agreement ¶ IV.14, MUR 5487 (Progress for America Voter Fund) (concluding that PFA VF had met the major purpose test after spending 60% of its funds on communications that "praised George W. Bush's leadership as President and/or criticized Senator Kerry's ability to provide similar leadership"); see also Stipulation for Entry of Consent Judgment ¶ 22, *FEC v. Citizens Club for Growth, Inc.*, Civ. No. 1:05-01851 (Sept. 6, 2007) (entering stipulation of Commission, approved as part of a consent judgment, where organization was treated as a political committee because "the vast majority of [the group's disbursements] were made in connection with federal elections, including, but not limited to, funding for candidate research, polling, and advertisements and other public communications referencing a clearly identified federal candidate").

1 examining an organization's major purpose, "excluding *all* non-express advocacy speech from  
2 consideration [is] contrary to law."<sup>64</sup>

3 For example, the Commission has relied, in part, on the following advertisements in  
4 determining that an entity was a political committee:

- 5 • **"Child's Pay"**: The advertisement contains "images of children performing  
6 labor-intensive jobs: washing dishes in a restaurant kitchen, vacuuming a hotel  
7 hallway, working on an assembly line in a factory, collecting garbage, working at  
8 an auto repair shop, and checking groceries," and concludes with the question:  
9 "Guess who's going to pay off President Bush's \$1 trillion deficit?"<sup>65</sup>
- 10 • **"70 Billion More"**: The advertisement shows images of a young boy sitting at a  
11 school desk and a young girl with a thermometer in her mouth. The voice-over  
12 states: "We could build thousands of new schools, or hire a million new teachers.  
13 We could make sure every child has insurance. Instead, George Bush has spent  
14 \$150 billion in Iraq and has a secret plan to ask for \$70 billion more. But after  
15 four years it's now clear: George Bush has no plan for taking care of America.  
16 Face it. George Bush is not on our side."<sup>66</sup>
- 17 • **"Jobs"**: "Is George Bush listening to us? Since taking office, he's let oil and  
18 energy companies call the shots. Special exemptions from the Clean Water and  
19 Clean Air Acts. Halliburton collecting billions in no-bid contracts. Here in  
20 Wisconsin, 52,500 manufacturing jobs lost. America is going in the wrong  
21 direction. And George Bush just listens to the special interests."<sup>67</sup>
- 22 • **"Yucca You Decide"**: "Yucca Mountain. While everyone plays politics, who's  
23 looking out for Nevada? Eighty-five percent of the nuclear waste could come  
24 through Las Vegas. Past businesses. Through communities. By our schools.  
25 Accidents happen, and if so, how could Las Vegas, a city and economy built on  
26 tourism, recover? Who would come visit us then? The question: did George W.  
27 Bush really try and stop Yucca Mountain? Or was he just playing politics?"<sup>68</sup>

<sup>64</sup> *CREW [AAN] I*, 209 F. Supp. 3d at 92 (emphasis in original) (internal quotation omitted); *see also id.* at 93 (concluding that "*many* or even *most* electioneering communications indicate a campaign-related purpose").

<sup>65</sup> Factual and Legal Analysis at 3-4, 12-13, MUR 5754 (MoveOn.Org Voter Fund). The full communication can be viewed at <http://www.youtube.com/watch?v=A9WKimKIyUQ>.

<sup>66</sup> *Id.* at 4, 12-13. The full communication can be viewed at <http://archive.org/details/movf70billionmore>.

<sup>67</sup> Factual and Legal Analysis at 5, 18, MUR 5753 (League of Conservation Voters 527). The full communication can be viewed at [http://archive.org/details/lcv\\_jobs\\_102604](http://archive.org/details/lcv_jobs_102604).

<sup>68</sup> *Id.* at 5, 18. The full communication can be viewed at [http://archive.org/details/lcv\\_yucca\\_decide](http://archive.org/details/lcv_yucca_decide)

- **“Finish It”**: [On screen: Images of Mohammed Atta, Osama bin Laden, Khalid Sheik Mohammed, Nick Berg’s killers, and victims of terrorist attacks.] “These people want to kill us. They killed hundreds of innocent children in Russia. Two hundred innocent commuters in Spain. And 3,000 innocent Americans. John Kerry has a 30-year record of supporting cuts in defense and intelligence and endlessly changed positions on Iraq. Would you trust Kerry against these fanatic killers? President Bush didn’t start this war, but he will finish it.”<sup>69</sup>
- **“Ashley’s Story”**: This advertisement recounts the story of Ashley Faulkner, whose mother was killed in the September 11, 2001, terrorist attacks, and the interaction she had with President George W. Bush during a visit to Ohio. It closes with Ashley Faulkner’s father stating: “What I saw was what I want to see in the heart and in the soul of the man who sits in the highest elected office in our country.”<sup>70</sup>

The Commission found that each of these advertisements — though not express advocacy — indicated that the respondents had as their major purpose the nomination or election of federal candidates. These ads evidenced that the organization’s major purpose was federal campaign activity because they “support,” “oppose,” “praise,” or “criticize” the federal candidates.<sup>71</sup>

This approach is also consistent with *CREW [AAN] II*, where the court determined that the term “political committee” “should presumptively include organizations that are primarily in the business of funding electioneering communications”<sup>72</sup> and further stated that “the Commission’s exclusion of electioneering ads from its major-purpose analysis should be the rare

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<sup>69</sup> Conciliation Agreement ¶ IV.14, MUR 5487 (Progress for America Voter Fund). The full communication can be viewed at <http://www.livingroomcandidate.org/commercials/2004/finish-it>.

<sup>70</sup> *Id.* The full communication can be viewed at <http://www.livingroomcandidate.org/commercials/2004/ashleys-story>.

<sup>71</sup> See *supra* notes 69-74.

<sup>72</sup> *CREW [AAN] II*, 299 F. Supp. 3d at 97; see also *id.* at 100 (concluding that the Act “make[s] clear that Congress intended to foreclose the Commission from applying a major-purpose framework that does not, at a minimum, presumptively consider spending on electioneering ads as indicating an election-related major purpose”).



1 exception, not the rule.”<sup>73</sup> The court in *CREW [AAN] II* provided guidance on factors relevant in  
2 determining whether the content of an electioneering communication may rebut the presumption  
3 of having an election-related purpose. For instance, it presented the following example that  
4 “could, under the Commission’s case-by-case approach, properly be deemed lacking an election-  
5 related purpose under *Buckley* despite meeting [the] definition of electioneering  
6 communication”:

7 It runs 60 days before a midterm election; it does not mention the election or even  
8 indirectly reference it (e.g., by cabining the message’s timeframe to “this  
9 November”); the meat of the ad discusses the substance of a proposed bill; the ad  
10 urges the viewer to call a named incumbent representative and request that she  
11 vote for the bill; but it does not make any reference to the incumbent’s prior  
12 voting history or otherwise criticize her.<sup>74</sup>

13 In contrast, the court analyzed a specific ad titled “Skype,” opining that “the primary purpose of  
14 this ad was to convince viewers to vote against [the candidate].”<sup>75</sup>

15 **Person 1:** *Hey, what’s up?*

16 **Person 2:** *Hey. You have to check out the article I just sent you.*  
17 *Apparently convicted rapists can get Viagra paid for by the new*  
18 *health care bill.*

19 **Person 1:** *Are you serious?*

20 **Person 2:** *Yep. I mean, Viagra for rapists? With my tax dollars? And*  
21 *Congresswoman Titus voted for it.*

22 **Person 1:** *Titus voted for it?*

23 **Person 2:** *Yep. I mean, what is going on in Washington?*

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<sup>73</sup> *Id.* at 100.

<sup>74</sup> *Id.* at 97.

<sup>75</sup> *Id.* at 99.

100474040001

1           **Person 1:**     *In November, we need to tell Titus to repeal it.* [Superimposed  
2                           text: "Tell Congresswoman Titus to vote for repeal in  
3                           November. Vote Yes on H.R. 4903. (202) 225-3252."].<sup>76</sup>

4     The court described "Skype" and other "similar ads" as "electioneering communications that  
5     harangue a candidate," explaining that such communications, in the court's view, do not  
6     overcome the presumption of having an election-related purpose simply because "they instruct  
7     the viewer to 'call' her representative rather than to 'vote against' him."<sup>77</sup> The court said that  
8     "Skype" is "awfully close" to the hypothetical posed by the Supreme Court in *McConnell* of an  
9     ad that is functionally identical in important respects to express advocacy.<sup>78</sup>

10           Pursuant to the Commission's case-by-case, fact-intensive approach to evaluating  
11     political committee status and major purpose, the Commission determines that each of the  
12     following 36 Crossroads GPS communications, many of which urge the viewer to "call" a  
13     representative or "tell" a candidate a particular message, rather than to "vote against" him or her,  
14     provide evidence, in addition to the reported independent expenditures, that Crossroads GPS had  
15     as its major purpose the nomination or election of federal candidates.

16                           i.       Mountain<sup>79</sup>

17           A balanced budget amendment in Washington would stop the mounting national debt  
18           that threatens Wisconsin's economy. Since Tammy Baldwin went to Washington,  
19           that debt has grown by \$10 trillion. Baldwin said she supported a balanced budget,

<sup>76</sup>       *Id.* at 98.

<sup>77</sup>       *Id.* at 99.

<sup>78</sup>       *Id.* ("An ad that, instead of urging viewers to vote against Jane Doe, condemned Jane Doe's record on a particular issue before exhorting viewers to 'call Jane Doe and tell her what you think.'") (quoting *McConnell v. FEC*, 540 U.S. 93, 127 (2003) (internal quotations and citations omitted)).

<sup>79</sup>       <http://www.youtube.com/watch?v=n3VyUIRXlk8>. Crossroads GPS spent \$250,000 on this ad.  
<http://www.crossroadsgps.org/2012/08/crossroads-gps-launches-second-issue-ad-in-wisconsin-focused-on-reckless-washington-spending/>.

1 then voted against a balanced budget amendment. In fact, she voted to raise the debt  
2 limit five times. Tell Tammy to stop spending money we don't have and support a  
3 balanced budget amendment. Support the New Majority Agenda at  
4 NewMajorityAgenda.org.

5  
6 ii. Suffered<sup>80</sup>

7 Florida's seniors are facing a health care crisis. Only fourteen physicians to every  
8 1,000 Medicare beneficiaries. But in Washington, Bill Nelson's been voting for the  
9 new health care law which cuts Medicare spending by \$700 billion, puts unelected  
10 bureaucrats between Florida's three million Medicare recipients and the care they need,  
11 hurting Florida's seniors. Tell Senator Nelson it's time to repeal. Support the New  
12 Majority Agenda at NewMajorityAgenda.org.

13  
14 iii. Get Up<sup>81</sup>

15 You get up, you work hard, you do the things that matter most. Another day. But  
16 today in Washington, America's debt increased 3.5 billion. 3.5 billion every single day  
17 since Jon Tester arrived in the U.S. Senate. Why? Tester voted for the trillion-dollar  
18 stimulus and the budget-busting health care law. And he's voted six times to raise the  
19 debt limit. So another day means more debt for them. Tell Tester: cut the debt.  
20 Support the New Majority Agenda at NewMajorityAgenda.org.

21  
22 iv. More Martin Spending<sup>82</sup>

23 Big Washington spending is not helping New Mexico. And the more money Martin  
24 Heinrich is spending is part of the problem. He voted to spend over a trillion dollars on  
25 the failed stimulus, like sending almost two million to California to collect ants, almost  
26 300,000 to Texas to study weather on Venus. But back in New Mexico, we've lost  
27 27,000 jobs. Tell Martin: more money wasted is not the solution. Focus on jobs for  
28 New Mexico. Support the New Majority Agenda at NewMajorityAgenda.org.  
29

<sup>80</sup> <http://www.youtube.com/watch?v=S2fTu4UHsdI>. Crossroads GPS spent a total of \$4,200,000 on  
"Suffered," "Get Up," "More Martin Spending," and "Channel." <http://www.crossroadsgps.org/2012/08/crossroads-gps-launches-4-2-million-issue-advocacy-push-in-four-states/>.

<sup>81</sup> [http://www.youtube.com/watch?v=\\_lXFzKsuBmM](http://www.youtube.com/watch?v=_lXFzKsuBmM).

<sup>82</sup> [http://www.youtube.com/watch?v=KH\\_vxDXpre8](http://www.youtube.com/watch?v=KH_vxDXpre8).

v. Channel<sup>83</sup>

Man on couch: "Oh boy. I need to take my mind off the terrible jobs situation."  
Man turns on television to a fake movie trailer, which states: "Coming to you this year: the health care takeover. Taxes on Ohio businesses that could kill jobs. Sherrod Brown gives two thumbs up."  
Man changes the channel to a fake advertisement for music compilation: "Call now and get great hits like 'Where did all the jobs go?' and 'Failed Stimulus.'"  
Man flips channel again to fake news teaser: "Tonight at eleven, how Sherrod Brown's latest vote could mean tax hikes on the small businesses Ohio depends on to create jobs."  
Man turns off television and sighs, stating: "Tell Sherrod Brown Ohio needs jobs, not more taxes."  
Narrator: "Support the New Majority Agenda at NewMajorityAgenda.org."

vi. People Over Government<sup>84</sup>

Who really creates jobs? Small business or big government? Claire McCaskill sides with government. Claire voted repeatedly for higher taxes on nearly half a million job-creating Missouri businesses. And Claire's vote for the health care law? Another huge tax increase. Meanwhile, Missouri's lost more than 53,000 manufacturing jobs. Tell Claire: stop taxing job creators and start cutting spending. Support the New Majority Agenda at NewMajorityAgenda.org.

vii. Sense<sup>85</sup>

It doesn't make sense. With our economy still struggling, Jon Tester votes to raise taxes on Montana families and small businesses. Tester's tax hike could cost hundreds of thousands of U.S. jobs. And Tester's tax-hiking ways aren't new. He was the deciding vote to pass the health care law, which we now know is a massive middle-class tax increase. Tell Tester: stop raising taxes on Montana families and small businesses. Support the New Majority Agenda at NewMajorityAgenda.org.

<sup>83</sup> [http://www.youtube.com/watch?v=CkUr\\_OPOTnE](http://www.youtube.com/watch?v=CkUr_OPOTnE).

<sup>84</sup> <http://www.youtube.com/watch?v=r3JDM2vDXYQ>. Crossroads GPS spent a total of \$3,400,000 on "People Over Government," "Sense," "Pay Raise," and "Holes." <http://www.crossroadsgps.org/2012/08/crossroads-gps-launches-new-issue-ads-in-four-state-focusing-on-tax-hikes-bigger-government/>.

<sup>85</sup> <http://www.youtube.com/watch?v=v5o0LkFours>.

viii. Pay Raise<sup>86</sup>

What's Heidi hiding on taxes? As attorney general, Heitkamp supported new taxes on car insurance and energy, even as she awarded her staff a 30% pay raise and allowed staff to fly a taxpayer-funded plane. Now Heitkamp supports higher taxes on North Dakota small businesses, raising taxes on job-creators just as our economy struggles to come back. Tell Heidi: stop supporting higher taxes on small businesses and North Dakota families. Support the New Majority Agenda at NewMajorityAgenda.org.

ix. Holes<sup>87</sup>

When Tim Kaine was governor, spending soared, blowing holes in the budget every year. Kaine backed massive tax hikes every year. His reckless spending was followed by devastating cuts to higher education. Tuition costs exploded. In Washington, Kaine pushed the failed stimulus, which wasted even more. Kaine's failed solutions? Tax hikes, wasteful spending. Tell him: that doesn't create jobs. Push to cut the debt. Support the New Majority Agenda at NewMajorityAgenda.org.

x. News<sup>88</sup>

News clip: "Good evening. This is the worst economic recovery America has ever had."

Narrator: "Forty-one straight months of unemployment over 8%. Almost 4 million fewer jobs than President Obama predicted. 23 million Americans without full-time work. The results of President Obama's failed stimulus policies."

News clip: "...the worst economic recovery America has ever had."

Narrator: "Tell him: for real job growth, stop spending and cut the debt. Support the New Majority Agenda at NewMajorityAgenda.org."

xi. Tried<sup>89</sup>

News clip: "...the weakest job-adding quarter in two years..."

<sup>86</sup> [http://www.youtube.com/watch?v=FSp6BM7eA\\_s](http://www.youtube.com/watch?v=FSp6BM7eA_s).

<sup>87</sup> <http://www.youtube.com/watch?v=ZellSEuO6Pg>.

<sup>88</sup> <http://www.crossroadsgps.org/2012/07/new-ad-news/>. Crossroads GPS spent \$11,000,000 on this ad. <http://www.crossroadsgps.org/2012/07/crossroads-gps-launches-new-tv-issue-ad-focused-on-worst-economic-recover-america-has-ever-had/>.

<sup>89</sup> <http://www.crossroadsgps.org/2012/07/new-ad-tried/>. Crossroads GPS spent \$8,000,000 on "Tried." <http://www.crossroadsgps.org/2012/07/crossroads-gps-launches-new-tv-issue-ad-on-jobs-and-debt/>.

1 Narrator: "It wasn't supposed to be this way. Over three years of crushing  
2 unemployment, American manufacturing shrinking again. President Obama's plan?  
3 Spend more. He's added four billion in debt every day. The economy's slowing, but  
4 our debt keeps growing. Tell him: for real job growth, cut the debt. Support the New  
5 Majority Agenda at NewMajorityAgenda.org."

6  
7 xii. Voice<sup>90</sup>

8 Montana said "no" to ObamaCare, but Jon Tester voted "yes." ObamaCare cuts  
9 Medicare spending by 500 billion, gives a board of unelected bureaucrats the power to  
10 restrict seniors' care, and raises taxes by half a trillion dollars. Instead of listening to  
11 Montana, Jon Tester supported ObamaCare. In fact, he's voted with Obama 95% of the  
12 time. Tell Tester: be Montana's voice in Washington. Repeal ObamaCare. Support  
13 the New Majority Agenda at NewMajorityAgenda.org.

14  
15 xiii. Show<sup>91</sup>

16 It's time to play "Who's the Biggest Supporter of the Obama Agenda in Ohio?" It's  
17 Sherrod Brown. Brown backed Obama's agenda a whopping 95% of the time. He  
18 voted for budget-busting ObamaCare that adds seven hundred billion to the deficit, for  
19 Obama's 453 billion dollar tax increase, and even supported cap-and-trade, which  
20 would have cost Ohio over one hundred thousand jobs. Tell Sherrod Brown: for real  
21 job growth, stop spending and cut the debt. Support the New Majority Agenda at  
22 NewMajorityAgenda.org.

23  
24 xiv. Ants<sup>92</sup>

25 Narrator: "Tim Kaine left Virginia for Washington and was a cheerleader for massive  
26 spending."

27 Clip of Kaine: "The stimulus is working."

28 Narrator: "But it actually wasted money studying ants in Africa."

29 Clip of Kaine: "This stimulus is critically important."

30 Narrator: "Really? How? To upgrade politicians' offices?"

31 Clip of Kaine: "These are investments that will put people to work right away."

32 Narrator: "But it failed miserably. Tell Tim Kaine: for real job growth, stop backing  
33 reckless spending. Support the New Majority Agenda at NewMajorityAgenda.org."

<sup>90</sup> <http://www.youtube.com/watch?v=xKEXcnihm7AM>. Crossroads GPS spent a total of \$2,500,000 on "Voice," "Show," and "Ants." <http://www.crossroadsgps.org/2012/07/crossroads-gps-launches-three-state-issue-advocacy-push/>.

<sup>91</sup> <http://www.youtube.com/watch?v=VTsIRspU4Qo>.

<sup>92</sup> <http://www.youtube.com/watch?v=CXQc0pOgMGY>.

xv. Excuses<sup>93</sup>

Narrator: "America's jobless rate is still too high. Barack Obama's got lots of excuses for the bad economy."

Clips of Obama: "...headwinds coming from Europe..."; "We've had a string of bad luck"; "...an earthquake in Japan..."; "...an Arab Spring..."; "...an ATM, you don't go to a bank teller..."; "...some things we could not control..."; "...go to the airport, and you're using a kiosk..."; "...we've been a little bit lazy, I think, over the last couple of decades...."

Narrator: "But Obama never blames Washington's wild spending and skyrocketing debt. Tell Obama, for real job growth, cut the debt. Support the New Majority Agenda at NewMajorityAgenda.org."

xvi. Tax<sup>94</sup>

Narrator: "Heidi Heitkamp promised..."

Clip of Heitkamp: "I would never vote to take away a senior's health care or limit anyone's care."

Narrator: "But Heidi endorsed ObamaCare, bragging..."

Clip of Heitkamp: "It actually is a budget-saver."

Narrator: "But ObamaCare raises half a trillion dollars in taxes on Americans. It cuts Medicare spending by 500 billion dollars and gives unelected bureaucrats the power to restrict seniors' care. Tell Heidi: support the repeal of ObamaCare. Support the New Majority Agenda at NewMajorityAgenda.org."

xvii. Why<sup>95</sup>

Narrator: "Heidi Heitkamp promised..."

Clip of Heitkamp: "I would never vote to take away a senior's health care or limit anyone's care."

Narrator: "But Heidi endorsed ObamaCare, bragging..."

<sup>93</sup> <http://www.crossroadsgps.org/2012/07/new-ad-excuses/>. Crossroads GPS states that it spent a total of \$25,000,000 on "News," "Tried," and "Excuses." <http://www.crossroadsgps.org/2012/07/crossroads-gps-launches-new-25m-tv-advocacy-blitz-on-debt-and-jobs/>. Because it spent \$11,000,000 on "News" and \$8,000,000 on "Tried," it evidently spent \$6,000,000 on "Excuses."

<sup>94</sup> <http://www.youtube.com/watch?v=BZwjPOG7eEg>. Crossroads GPS spent \$180,000 on this ad. <http://www.crossroadsgps.org/2012/06/crossroads-gps-relaunches-north-dakota-issue-ad-alerts-citizens-to-obamacare-tax/>.

<sup>95</sup> <http://www.youtube.com/watch?v=LEM94pWpBo4>. Crossroads GPS spent \$180,000 on this ad. <http://www.crossroadsgps.org/2012/06/crossroads-gps-continues-issue-ads-in-north-dakota-calling-for-action-to-repeal-obamacare/>.

1 Clip of Heitkamp: "It actually is a budget-saver."

2 Narrator: "ObamaCare cuts Medicare spending by five hundred billion dollars, gives  
3 unelected bureaucrats the power to restrict seniors' care, and millions of Americans  
4 could actually lose their existing health care. Tell Heidi: support the full repeal of  
5 ObamaCare. Support the New Majority Agenda at NewMajorityAgenda.org."

6  
7 xviii. Spending<sup>96</sup>

8 Senator Claire McCaskill was a key Obama advisor in passing his failed 1.18 trillion  
9 dollar stimulus. Claire's vote sent nearly two million dollars to California to collect  
10 ants in Africa, 25 million for new chairlifts and snow-making in Vermont, almost  
11 300,000 to Texas to study weather — on Venus — while in Missouri, 16,000 have lost  
12 their jobs. Tell Claire to help Missouri, stop the reckless spending, cut the debt, and  
13 support the New Majority Agenda at NewMajorityAgenda.org.

14  
15 xix. Change<sup>97</sup>

16 Narrator: "Heidi Heitkamp supports ObamaCare and predicted..."

17 Clip of Heitkamp: "This bill will change the face of health care."

18 Narrator: "She's right. ObamaCare cuts Medicare spending by 500 billion, gives  
19 unelected bureaucrats the power to restrict seniors' care, and now health care costs and  
20 premiums are likely to go up. That's not the change we need. Tell Heidi ObamaCare is  
21 wrong for North Dakota. Support the New Majority Agenda at  
22 NewMajorityAgenda.org."

23  
24 xx. Cheap<sup>98</sup>

25 Narrator: "It's no surprise Sherrod Brown voted for ObamaCare. He supports  
26 Obama's agenda 95% of the time. On ObamaCare, Brown said..."

27 Clip of Brown: "This bill pays for itself, actually reduces the deficit."

28 Narrator: "Actually, it adds 700 billion to the deficit, cuts 500 billion from Medicare  
29 spending, adds a new tax on Ohio manufacturers. In Sherrod Brown's Washington,  
30 talk is cheap. But in Ohio, it's costing us a fortune. Tell Brown: repeal ObamaCare.  
31 Support the New Majority Agenda at NewMajorityAgenda.org."

96 <http://www.youtube.com/watch?v=ojd7quHa3Sc>. Crossroads GPS spent a total of \$2,000,000 on  
"Spending," "Change," and "Cheap." <http://www.crossroadsgps.org/2012/06/crossroads-gps-demands-action-to-stop-reckless-spending-and-obamacare-in-three-state-ad-blitz/>.

97 [http://www.youtube.com/watch?v=EW3hyhGrT\\_Y](http://www.youtube.com/watch?v=EW3hyhGrT_Y).

98 <http://www.youtube.com/watch?v=4crbHaIdJE4>.



xxi. Stopwatch<sup>99</sup>

Narrator: "Why isn't the economy stronger? In the seconds it takes to watch this, our national debt will increase \$1.4 million. In 2008, Barack Obama said..."

Clip of Obama: "We can't mortgage our children's future on a mountain of debt."

Narrator: "Now he's adding four billion in debt every day, borrowing from China for his spending. Every second, growing our debt faster than our economy. Tell Obama: stop the spending. Support the New Majority Agenda at NewMajorityAgenda.org."

xxii. Obama-Claire<sup>100</sup>

ObamaCare? More like ObamaClaire. Because Senator Claire McCaskill has voted with President Obama 90% of the time, including ObamaCare. Cutting half a trillion in Medicare spending — cuts that could slash benefits for some Medicare enrollees. And a board of unelected bureaucrats with the power to restrict seniors' access to medical care. ObamaClaire brought us ObamaCare, and that's bad medicine for health care. Tell Claire: support the New Majority Agenda. Repeal ObamaCare. Learn more at NewMajorityAgenda.org.

xxiii. Basketball<sup>101</sup>

I always loved watching the kids play basketball. I still do, even though things have changed. It's funny. They can't find jobs to get their careers started, and I can't afford to retire. And now we're all living together again. I supported President Obama because he spoke so beautifully. He promised change, but things changed for the worse. Obama started spending like our credit cards have no limit. His health care law made health insurance even more expensive. We've had stimulus and bailouts. Obama added almost \$16,000 in debt for every American. How will my kids pay that off when they can't even find jobs? Now Obama wants more spending and taxes. That won't fix things. I had so many hopes. Cutting taxes and debt and creating jobs—that's the change we need. Tell President Obama to cut the job-killing debt and support the New Majority Agenda at NewMajorityAgenda.org.

<sup>99</sup> <http://www.crossroadsgps.org/2012/06/new-ad-stopwatch/>. Crossroads GPS spent \$7,000,000 on this ad. <http://www.crossroadsgps.org/2012/06/crossroads-gps-launches-7-million-issue-ad-aimed-at-economy-and-debt/>.

<sup>100</sup> <http://www.youtube.com/watch?v=523OoAekib8>. Crossroads GPS spent \$516,000 on this ad. <http://www.crossroadsgps.org/2012/05/crossroads-gps-airs-new-tv-issue-ad-about-claire-mccaskills-support-for-obamacare-2/>.

<sup>101</sup> <http://www.crossroadsgps.org/2012/05/our-new-ad-basketball/>. Crossroads GPS spent \$9,700,000 on this ad. <http://www.crossroadsgps.org/2012/05/crossroads-gps-launches-9-7-million-tv-issue-ad-basketball-to-frame-debate-on-economy-taxes-and-debt/>.

xxiv. Disturbing<sup>102</sup>

Bob Kerrey supported the Wall Street bailout while serving on the board of a company that tried to exploit it. Kerrey's company tried a bureaucratic ploy to get bailout funds, but the ploy failed. These schemes were called a disturbing trend by an independent watchdog, violating the spirit of the law to jump on the gravy train. For Bailout Bob Kerrey, it's Wall Street ways, not Nebraska values. Tell him: support balanced budgets, not bailouts.

xxv. Obama's Promise<sup>103</sup>

Narrator: "President Obama's agenda promised so much."

Clip of Obama: "We must help the millions of homeowners who are facing foreclosure."

Narrator: "Promise broken. One in five mortgages are still underwater."

Clip of Obama: "If you are a family making less than \$250,000 a year, you will not see your taxes go up."

Narrator: "Broken. ObamaCare raises eighteen different taxes."

Clip of Obama: "If you like your health care plan, you'll be able to keep your health care plan."

Narrator: "Broken. Millions could lose their health care coverage and could be forced into a government pool."

Clip of Obama: "Today I'm pledging to cut the deficit we inherited by half by the end of my first term in office."

Narrator: "Broken, because he hasn't even come close. We need solutions, not just promises. Tell President Obama to cut the deficit and support the New Majority Agenda at NewMajorityAgenda.org."

xxvi. Quote Leadership<sup>104</sup>

19,000 jobs lost in Missouri since 2009. 23,000 homes lost to foreclosure in 2011. And what have President Obama and Claire McCaskill been doing? Over a trillion

<sup>102</sup> <http://www.youtube.com/watch?v=ow5dQMYaq0Q>. Crossroads GPS spent \$260,000 on this ad. <http://www.crossroadsgps.org/2012/05/crossroads-gps-launches-new-tv-ad-on-bob-kerreys-support-for-the-wall-street-bailout/>.

<sup>103</sup> <http://www.crossroadsgps.org/2012/05/new-ad-obamas-promise/>. Crossroads GPS spent \$8,000,000 on this ad. <http://www.crossroadsgps.org/2012/05/crossroads-gps-launches-25-million-tv-ad-initiative-over-next-month-to-frame-debate-on-economy-obamacare-debt/>.

<sup>104</sup> <http://www.youtube.com/watch?v=PATWzOOpeY0>. Crossroads GPS spent a total of \$1,200,000 on "Quote Leadership," "Way," "Hole," "Amazing," and "Similarities." <http://www.crossroadsgps.org/2012/04/crossroads-gps-ad-launches-issue-ads-in-five-states-targeting-reckless-senate-spending-higher-taxes/>.

1 dollars in failed stimulus. Costly ObamaCare, where over a million eligible Missouri  
2 seniors could be forced to pay more for their prescription drugs. Tell Senator  
3 McCaskill it's time stop supporting Obama's outrageous spending. Say "no" to  
4 Obama's proposed trillion dollar deficit.

5  
6 xxvii. Way<sup>105</sup>

7 Narrator: "Remember this from Jon Tester?"

8 Clip of Tester: "Washington has lost its way, and we need to set it right."

9 Narrator: "But in Washington, Tester's way is Obama's way. Tester voted with  
10 President Obama 97% of the time. Tester voted for Obama's trillion dollar deficits, for  
11 cap-and-trade — a massive energy tax — and for budget-busting ObamaCare. Tell Jon  
12 Tester: Obama's way is the wrong way for Montana. Tell him to say 'no' to Obama's  
13 proposed trillion dollar deficit."

14  
15 xxviii. Hole<sup>106</sup>

16 Nevada's in a hole. Unemployment's the worst in the country. Housing, too. And  
17 what's Shelley Berkley been doing in Washington? Voting for tax hikes that would  
18 make it worse. Even the largest tax increase in history. She voted for a massive new  
19 energy tax that would cost families \$1,600 a year. And on spending, Berkley supported  
20 a budget that pushed deficits sky high, piling up debt. Tell Shelley Berkley: vote  
21 against higher taxes that would cost more jobs.

22  
23 xxix. Amazing<sup>107</sup>

24 Narrator: "Do you think Barack Obama has been amazing?"

25 Clip of Heidi Heitkamp: "I think Barack Obama's going to be amazing, and I think we  
26 are on our way to a better United States."

27 Narrator: "Heidi Heitkamp supports ObamaCare, which costs over a trillion dollars,  
28 cuts 500 billion in Medicare spending, and gives fifteen unelected bureaucrats the  
29 power to restrict seniors' care. Tell Heidi: ObamaCare is not the way to a better  
30 United States. Support the repeal of ObamaCare."  
31

<sup>105</sup> <http://www.youtube.com/watch?v=xbx0De-BMR4>.

<sup>106</sup> [http://www.youtube.com/watch?v=oMWB\\_kLBNHc](http://www.youtube.com/watch?v=oMWB_kLBNHc).

<sup>107</sup> <http://www.crossroadsgps.org/2012/04/1349/>.

xxx. Similarities<sup>108</sup>

Tim Kaine and Barack Obama. One's a former governor, the other is President. Can you spot the similarities? Reckless spending. That's Tim Kaine's billion dollar spending spree. Red ink. Governor Kaine turned a billion dollar surplus into a \$3.7 billion shortfall. Taxes. Kaine pushed a billion dollar tax hike. Reckless spending, red ink, higher taxes. They have a lot in common. We work hard and save; Obama and Kaine tax and spend.

xxxi. Too Much<sup>109</sup>

News clip: "Under President Obama, domestic oil production is at an eight-year high."  
Narrator: "Oh really? His own administration admits production's down where Obama's in charge. The real story..."  
News clip: "A lot of these increases in production went back to Bush-era decisions, and most of them, of course, are on private land. So you're taking credit for this boost in exploration, which is not really fair."  
Narrator: "Taking credit for others' hard work: typical Washington. No matter how Obama spins it, gas costs too much. Tell Obama: stop blaming others. Work to pass better energy policies."

xxxii. Deflect (reported as electioneering communication)<sup>110</sup>

Narrator: "Then and now. The difference? President Obama's administration restricted oil production in the Gulf, limited development of American oil shale, and Obama personally lobbied to kill a pipeline bringing oil from Canada. Even now, instead of helping..."  
News clip: "At the White House for three weeks, the word has been deflector shield on gas prices, put up the deflector shield."  
Narrator: "The President's playing politics. Tell President Obama: bad energy policies mean energy prices we can't afford."

<sup>108</sup> <http://www.youtube.com/watch?v=NX-2EDVHRxY>.

<sup>109</sup> <http://www.crossroadsgps.org/2012/04/new-ad-too-much/>. Crossroads GPS spent \$1,700,000 on this ad. <http://www.crossroadsgps.org/2012/04/new-crossroads-gps-ad-presses-obama-on-failure-to-keep-gas-prices-low/>.

<sup>110</sup> <http://www.crossroadsgps.org/2012/03/new-ad-deflect-2/>. Crossroads GPS spent \$650,000 on this ad. <http://www.crossroadsgps.org/2012/03/crossroads-gps-launches-new-national-tv-ad-focused-on-obamas-failed-energy-policy/>. Crossroads GPS reported \$118,305 of this total as an electioneering communication. <http://images.nictusa.com/pdf/487/12970790487/12970790487.pdf>.

xxxiii. From There<sup>111</sup>

Here's Claire McCaskill using special interest cash to hide the fact she's voted against what's best for Missouri. Claire claims to protect Medicare? But she voted to cut Medicare spending half a trillion dollars by supporting ObamaCare. Claire claims to cut taxes for the middle class? But she has also voted against extending tax cuts, including the child tax credit, death tax, and marriage penalty. Tell Claire: on Medicare and taxes, start voting in Washington the way you talk in Missouri.

xxxiv. Balloon<sup>112</sup>

America's debt is at an all-time high. But for President Obama and Congressman Leonard Boswell, when spending our money, the sky's the limit. Boswell voted for Obama's stimulus bill. \$825 billion in wasted spending. They bailed out auto companies for 85 billion. And by supporting ObamaCare, Boswell and Obama upped spending another \$700 billion. Tell Congressman Boswell to get his head out of the clouds and stop out of control Washington spending.

xxxv. Lemmings and Liberals<sup>113</sup>

Only two creatures on Earth follow their leaders over a cliff: lemmings and Washington liberals. Senator Claire McCaskill followed the President over a cliff with ObamaCare. Trillions in higher debt. Special interest bailouts. Wasted stimulus spending. Now President Obama is forcing religious hospitals and charities to provide services that violate their beliefs. Republicans and Democrats have called on President Obama to withdraw his extreme rule, but Washington insider Claire McCaskill is tone-deaf to the real world. She's defending this ObamaCare mandate, inserting government into our private lives as never before. Senator McCaskill told voters she wanted to be held accountable. Take her at her word. Call Senator McCaskill at 816-421-1639. Tell her to change her position before she and President Obama destroy freedoms that make America great.

<sup>111</sup> <http://www.youtube.com/watch?v=8gxo0Xsi7s8>. Crossroads GPS spent \$300,000 on this ad. <http://www.crossroadsgps.org/2012/03/crossroads-gps-launches-tv-ad-exposing-claire-mccaskills-support-of-medicare-cuts-tax-hikes/>.

<sup>112</sup> <http://www.youtube.com/watch?v=myO98FkQcvs>. Crossroads GPS spent \$77,000 on this ad. <http://www.crossroadsgps.org/2012/03/crossroads-gps-launches-new-issue-ad-in-iowa-targeting-leonard-boswells-sky-high-government-spending/>.

<sup>113</sup> <http://www.youtube.com/watch?v=Qy5eBX7t6XM>. Crossroads GPS spent \$65,000 on the ad. <http://www.crossroadsgps.org/2012/02/crossroads-gps-launches-new-radio-ad-targeting-claire-mccaskills-tone-deaf-support-for-president-obamas-policies/>.

xxxvi. Every Level (reported as electioneering communication)<sup>114</sup>

Narrator: “He promised...”

Clip of President Obama: “We’re investing in a clean energy economy with the potential to create hundreds of thousands of jobs.”

Narrator: “Then he gave his political backers billions — a big government fiasco infused with politics at every level. 500 million to Solyndra — now bankrupt. Nearly 100 million to a pet project teetering on default. Laid-off workers: forgotten. Typical Washington. Tell President Obama we need jobs, not more insider deals.”

Crossroads GPS argues in its response that none of the above communications can be classified as express advocacy under either 11 C.F.R. §§ 100.22(a) or 100.22(b), or as the functional equivalent of express advocacy under *Wisconsin Right to Life, Inc. v. FEC*,<sup>115</sup> and therefore none of them constitute federal campaign activity.<sup>116</sup> But the required major purpose test is not limited solely to asking whether the organization’s spending was on express advocacy (or the functional equivalent of express advocacy). The court in *CREW [AAN] I*, for example, explained that “[*WRTL*’s] constitutional division between express advocacy and issue speech is simply inapposite in the disclosure context” of a political committee status assessment.<sup>117</sup> Indeed, that court concluded that a “decision to apply [*WRTL*’s] express advocacy/issue speech

<sup>114</sup> <http://www.crossroadsgps.org/2012/02/crossroads-gps-launches-new-ad-every-level/>. Crossroads GPS spent \$500,000 on the ad. <http://www.crossroadsgps.org/2012/02/crossroads-gps-launches-new-tv-ad-on-solyndra-fiasco/>. Crossroads GPS reported \$74,670 of this total as electioneering communications. Form 9 (Feb. 22, 2012) (\$40,401); Form 9 (Feb. 23, 2012) (\$31,218); Form 9 (Feb. 23, 2012) (\$3,049).

<sup>115</sup> 551 U.S. 449 (2007) (“*WRTL*”).

<sup>116</sup> Resp. at 9-11; Supp. Resp. at 11.

<sup>117</sup> *CREW [AAN] I*, 209 F. Supp. 3d at 90 (discussing multiple federal court decisions rejecting such a division in a disclosure context after *Citizens United v. FEC*).

1 distinction in the realm of disclosure [in a political committee status analysis], thereby excluding  
2 *all* non-express advocacy speech from consideration” was contrary to law.<sup>118</sup>

3 Nor does *Buckley* support an argument that determining an organization’s major purpose  
4 is limited to consideration of its express advocacy. The Court first established the major purpose  
5 test in the context of its discussion of section 30104(e) — a provision that required the disclosure  
6 of expenditures by persons *other* than political committees. In order to cure vagueness concerns  
7 in that section, the Court construed “expenditure” to reach only express advocacy.<sup>119</sup> By  
8 contrast, limiting which expenditures *political committees* would have to disclose, the Court held  
9 that the term “political committee” — as defined in section 30101(4) — “need only encompass  
10 organizations that are under the control of a candidate or the major purpose of which is the  
11 nomination or election of a candidate.”<sup>120</sup> Thus, the two limitations were imposed on two  
12 different terms in two different sections of the Act: (1) “express advocacy” as a limitation on  
13 “expenditures” made by persons other than political committees pursuant to section 30104(e);  
14 and (2) “major purpose” as a limitation on the definition of “political committee” pursuant to  
15 section 30101(4). The opinion could have articulated a test that linked the limitations —  
16 requiring, for example, that to be considered a political committee an organization’s “major  
17 purposed must be to *expressly advocate* the nomination or election of a candidate.” But the  
18 Court did not take that tack. Indeed, the Court noted that even “*partisan committees*,” which  
19 include “groups within the control of the candidate or *primarily organized for political*

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<sup>118</sup> *Id.* at 92 (emphasis in original).

<sup>119</sup> *Id.* at 79-80.

<sup>120</sup> *Id.* at 79.

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1 *activities*” would fall outside the definition of “political committee” *only* if they fail to meet the  
2 statutory spending threshold.<sup>121</sup>

3 Though not express advocacy communications, the 36 communications set forth above  
4 — two of which are electioneering communications — provide support, in addition to  
5 Crossroads GPS’s reported independent expenditures, for the determination that there is reason  
6 to believe Crossroads GPS had as its major purpose the nomination or election of federal  
7 candidates. Each of the 36 ads refers to a clearly identified federal candidate, opposes or  
8 criticizes that candidate, and was run in the candidate’s respective state or congressional district  
9 shortly before a primary or general election.<sup>122</sup> The fact that the ads do not contain express

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<sup>121</sup> *Id.* at 80, n.107 (emphasis added).

<sup>122</sup> While Crossroads GPS reported two of the 36 advertisements as electioneering communications, there is not have sufficient information in the current record about the distribution of the other 34 communications to determine that they were or were not within the definition of “electioneering communication.” It appears that Crossroads GPS issued news releases indicating that some of the communications started airing on broadcast or cable shortly before the beginning of the general election electioneering communication window. *See, e.g.*, Crossroads GPS Launches Second Issue Ad in Wisconsin Focused on Reckless Washington Spending, <http://www.crossroadsgps.org/2012/08/crossroads-gps-launches-second-issue-ad-in-wisconsin-focused-on-reckless-washington-spending/> (indicating that the “Mountain” ad started running on August 24, 2012, 10 days after the close of the Wisconsin congressional primary electioneering communication window and two weeks before the start of the general election window, but not noting the anticipated length of the ad campaign); Crossroads GPS Launches \$4.2 Million Issue Advocacy Push in Four States, <http://www.crossroadsgps.org/2012/08/crossroads-gps-launches-4-2-million-issue-advocacy-push-in-four-states/> (noting start date of August 23, 2012, but no stop date, for “Suffered,” “Get Up,” “More Martin Spending,” and “Channel” ads); Crossroads GPS Demands Action to Stop Reckless Spending and Obamacare in Three-state Ad Blitz, <http://www.crossroadsgps.org/2012/06/crossroads-gps-demands-action-to-stop-reckless-spending-and-obamacare-in-three-state-ad-blitz/> (indicating that the “Spending,” “Change,” and “Cheap” ads started on June 13, 2012 and ran for two weeks, which for “Change” would begin the day after the North Dakota primary and for “Spending” would end shortly before the Missouri primary window); *but see* Crossroads GPS Launches New Issue Ads in Four States Focusing on Tax Hikes, Bigger Government, <http://www.crossroadsgps.org/2012/08/crossroads-gps-launches-new-issue-ads-in-four-state-focusing-on-tax-hikes-bigger-government/> (noting, for “People Over Government,” “Sense,” “Pay Raise,” and “Holes” ads, distribution dates of August 8-14, 2012, which begins the day after the close of the Missouri congressional primary window and ends about three weeks before the beginning of the general election window); Crossroads GPS Launches New TV Issue Ad Focused on “Worst Economic Recovery America Has Ever Had,” <http://www.crossroadsgps.org/2012/07/crossroads-gps-launches-new-tv-issue-ad-focused-on-worst-economic-recover-america-has-ever-had/> (indicating July 31 – August 6, 2012, distributions, before beginning of general election window).



1 advocacy, or the functional equivalent of express advocacy, does not shield the ads from  
2 consideration under the major purpose test. Similarly, the fact that some of the ads conclude  
3 with a request that the viewer visit a website or call the candidate and tell the candidate to take  
4 purported legislative action (e.g., “Tell Congressman Boswell to get his head out of the clouds  
5 and stop out of control Washington spending.”) does not mean that the spending on such  
6 communications cannot be counted towards a finding of a major purpose to nominate or elect  
7 candidates.<sup>123</sup>

8 For example, one of the communications explicitly references political parties and voting;  
9 “Lemmings and Liberals” refers to “Washington liberals,” “Republicans and Democrats,” and  
10 “voters” before urging such voters to take action (by calling McCaskill).<sup>124</sup> And, although the  
11 remaining communications do not reference candidates’ candidacies in the upcoming elections  
12 or voting by the general public, “Deflect” (one of the two reported ads reported as electioneering  
13 communications) refers to “playing politics”; “Every Level” (the other reported electioneering  
14 communication) refers to “a big government fiasco infused with politics” to the benefit of  
15 “political backers” in “Typical Washington”; and “Ants” refers to “politicians’ offices.”  
16 Additionally, two of the communications — “Change” and “Basketball” — reference Obama’s

<sup>123</sup> See, e.g., *CREW [AAN] I*, 209 F. Supp. 3d at 92 n.10 (rejecting an application of the functional equivalent of express advocacy standard in a political committee status matter that would exclude, for example, all advertisements containing “appeal[s] to contact a candidate”).

<sup>124</sup> Cf. *CREW [AAN] II*, 299 F. Supp. 3d at 97 (providing the following example of the rare electioneering communication that may lack an election-related purpose: an ad, the meat of which discusses a proposed bill and urges action by a legislator on that bill, and which is distributed within the electioneering communication 60-time window but “does not mention the election or even indirectly reference it (e.g., by cabining the message’s timeframe to ‘this November,’)” and which does not mention that representative’s prior voting history or criticize her).

1 2008 electoral slogan (“Change we can believe in”);<sup>125</sup> the former of these states that Heitkamp’s  
2 support of Obamacare is “not the change we need” while the latter states that Obama “promised  
3 change, but things changed for the worse” before stating that tax cuts are “the change we need.”

4 In another group of examples, several of the purportedly legislatively-oriented  
5 communications are, in fact, electoral in the way they attack non-legislators.<sup>126</sup> “Pay Raise,”  
6 “Tax,” “Why,” “Amazing,” “Similarities,” “Holes,” and “Disturbing” negatively contrast the  
7 identified candidate’s background or positions against activity conducted in Washington  
8 although the individuals identified in those ads — Heitkamp, Kaine, and Kerrey — were not  
9 officeholders (either federal, state, or local) when the ads ran. As non-officeholders, these  
10 individuals were in no position to affect the federal political activities, issues, or programs  
11 mentioned in the manner discussed in the ads. Thus, statements in these ads encouraging the  
12 individuals to change their positions on the identified issues have no nexus with the legislative  
13 process.<sup>127</sup> More to the point, Heitkamp, Kaine, and Kerrey were in no position to implement  
14 any of their plans unless they were elected.

15 Similarly, another ad (“Get Up”) that purports to call on viewers to call an incumbent  
16 Senator to take legislative action (“Tell Tester” to “cut the debt”) is most reasonably read as  
17 indicative of campaign activity because the ad’s statement that debt increases “every single day”  
18 Tester is “in the U.S. Senate” conveys that limiting Tester’s additional days in the U.S. Senate  
19 (via electoral defeat) will limit his ability to raise that debt. Furthermore, another group of the

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<sup>125</sup> See 11 C.F.R. § 100.22(a) (including slogans in definition of express advocacy).

<sup>126</sup> See, e.g., Factual and Legal Analysis at 11-14, MUR 6538R (Americans for Job Security) (finding that spending on “legislative” communications that criticize or support non-legislator federal candidates can be counted towards a consideration of a major purpose to nominate or elect federal candidates).

<sup>127</sup> See *id.* at 13.

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1 communications criticize candidates' character or fitness, including allegations of being  
2 "reckless" ("Spending"), "using special interest cash to hide" voting records ("From There") or  
3 having their heads in "the clouds" ("Balloon"). These examples all highlight aspects of the  
4 communications that, akin to the electioneering communications considered in the *CREW [AAN]*  
5 cases, indicate a major purpose to nominate or elect federal candidates.

6 Concerning the time frame under which a group's spending should be considered,  
7 Crossroads GPS argues that "political committee status has been judged in the past according to  
8 whatever time frame is most appropriate to the case at hand, as opposed to simply applying an  
9 inflexible or predetermined time frame (such as the full calendar year in which the activity at  
10 issue occurred)" in support of its position that the Commission should only examine its 2012  
11 spending through June 20, 2012, the date on which the Complaint was filed.<sup>128</sup> In *CREW [AAN]*  
12 *I*, the court ruled that the Commission's analysis of the relevant time period for evaluating a  
13 group's spending must be flexible to account for changes in an organization's major purpose  
14 over time.<sup>129</sup>

15 A calendar year provides the firmest statutory footing for the Commission's major  
16 purpose determination — and is consistent with the Act's plain language. The Act defines  
17 "political committee" in terms of expenditures made or contributions received "*during a*

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<sup>128</sup> Supp. Resp. at 3 (in response to March 5, 2013, status letter inviting any additional response addressing "calendar year 2012" activity).

<sup>129</sup> See *CREW [AAN] I*, 209 F. Supp. 3d at 94 (noting both that "it is not *per se* unreasonable that the Commissioners would consider a particular organization's full spending history as relevant to its analysis" and that "[l]ooking *only* at relative spending over an organization's lifetime runs the risk of ignoring the not unlikely possibility, contemplated by the Supreme Court, that an organization's major purpose can *change*") (emphasis in original).

1 *calendar year.*<sup>130</sup> Additionally, in *Malenick*, the court's holding specifically addressed only one  
2 calendar year (1996) because that was the only year during which Triad received \$1,000 in  
3 contributions.<sup>131</sup> That the *Malenick* decision, which is cited by the 2007 Supplemental E&J,  
4 used a calendar year approach confirms that such an approach to major purpose is consistent  
5 with both the statutory language and *Buckley*'s judicial gloss on that language. Such an approach  
6 is further reflected in several MURs, including those referenced in the 2007 Supplemental E&J  
7 as guidance for the Commission's major purpose test, in which the Commission only considered  
8 groups' spending over the period leading up to an election, an approach that is largely consistent  
9 with a calendar year approach.<sup>132</sup>

10 In consideration of the circumstances of this matter, using a calendar year approach<sup>133</sup>  
11 falls squarely within the relevant precedent and is consistent with the ruling in *CREW [AAN]*

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<sup>130</sup> 52 U.S.C. § 30101(4) (emphasis added).

<sup>131</sup> 310 F. Supp. 2d 230, 237 (D.D.C. 2004) ("Accordingly, because Triad and then Triad Inc.'s major purpose was the nomination or election of specific candidates in 1996, and because Triad received contributions aggregating more than \$1,000 in 1996, I find that Triad and Triad, Inc., operated as a 'political committee' in 1996.") (emphasis added); see also *GOPAC*, 917 F.Supp. 851, 853 (group founded in 1979, yet court discusses major purpose only in 1989 and 1990).

<sup>132</sup> See MUR 5492 (Freedom, Inc.) (analyzing group's admitted major purpose in 2004 even though group was formed in 1962); MURs 5577 and 5620 (National Association of Realtors – 527 Fund) (analyzing NAR-527 Fund's 2004 spending even though group had registered with IRS since 2000); MUR 5755 (New Democrat Network) (analyzing New Democrat Network's 2004 spending while group had existed since at least 1996); MUR 5753 (League of Conservation Voters) (analyzing LCV's 2004 spending even though one of LCV's funds had registered with the IRS as early as 2000); see also MURs 5694, 5910 (Americans for Job Security) (analyzing activity from 2000 through 2006 in determining group's major purpose in 2006, despite the fact that the group was founded in 1997); MUR 5487 (Progress for America VF) (analyzing group's major purpose based on 2004 disbursements where group had raised \$4.6 million and spent \$11.2 million through 2006). Frequently a group's spending only occurs during the calendar year of an election, forming the sole basis for deciding whether its spending has triggered major purpose. See MURs 5511 and 5525 (Swift Boat Veterans and POWs for Truth) (only activity of group was in 2004); MUR 5541 (November Fund) (only activity of group was in 2004); MUR 5568 (Empower Illinois) (only activity of group was in 2004); MURs 5977 and 6005 (American Leadership Project) (only activity of group was in 2008); MUR 6317 (Utah Defenders of Constitutional Integrity) (only activity of group was in 2010).

<sup>133</sup> The Commission has determined previously that analyzing major purpose on the basis of an entity's fiscal year would be inappropriate, as "neither FECA, as amended, nor any judicial decision interpreting it, has substituted tax status for the conduct-based determination required for political committee status." Supplemental E&J at 5598.

1 I.<sup>134</sup> Thus, whether Crossroads GPS had the requisite major purpose may be determined by  
2 reference to its activities during the 2012 calendar year.

3 \* \* \* \*

4 In sum, Crossroads GPS appears to have spent approximately \$138,646,864 during 2012  
5 on the type of communications that is appropriately considered federal campaign activity, and  
6 therefore indicative of major purpose. Crossroads GPS estimates that it spent \$188,886,899  
7 during calendar year 2012.<sup>135</sup> Based on the available information, the amount Crossroads GPS  
8 spent on federal campaign activity appears to be at least approximately 73.4 % of Crossroads  
9 GPS's total spending for calendar year 2012. The Commission has never set a threshold on the  
10 proportion of spending on major purpose activities required for political committee status and  
11 declines to do so now. Without determining whether it is *necessary* to cross a 50 percent  
12 threshold to determine an organization's major purpose, it is *sufficient* in this case, based on the  
13 available information, to find reason to believe that Crossroads GPS's major purpose during  
14 2012 was federal campaign activity (*i.e.*, the nomination or election of federal candidates).<sup>136</sup>

<sup>134</sup> The identification of a calendar year as the timeframe for applying the major purpose test, like all aspects of the major purpose test, is "a creature of statutory interpretation." See *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 487 (7th Cir. 2012); see also 52 U.S.C. § 30101(4)(a) (incorporating calendar year in determination of statutory threshold for "political committee" definition).

<sup>135</sup> Supp. Resp. at 9.

<sup>136</sup> Crossroads GPS argues that its spending on independent expenditures does not constitute the majority of its activity when compared to its total spending since its founding in June 2010. Supp. Resp. at 8-9. But major purpose appears to be satisfied even if we were to analyze Crossroads GPS's spending over the organization's entire active life. Crossroads GPS estimates that it spent \$253,607,413 "over the life of the organization (through 2012)." Supp. Resp. at 9. Crossroads GPS's 2012 spending on federal campaign activity thus accounted for 55% of the amount it spent during its entire active life (through 2012). In reaching this conclusion, we do not intend to express the view that a finding of major purpose requires clearance of a 50% threshold, but only that the spending on federal campaign activity in this case is alone sufficient to support a finding of major purpose.

**C. Conclusion**

Crossroads GPS made over \$1,000 in expenditures during 2012, and its spending during that calendar year indicates that it had as its major purpose federal campaign activity (*i.e.*, the nomination or election of federal candidates). Accordingly, the Commission finds reason to believe that Crossroads GPS violated 52 U.S.C. §§ 30102, 30103, and 30104 by failing to organize, register, and report as a political committee, and authorizes an investigation.

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